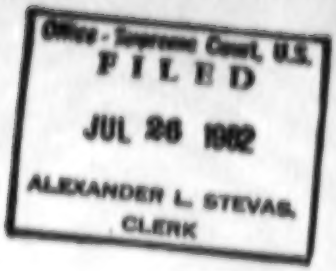
82-137



IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

JAMES LAMMERS Petitioner

vs.

DOUGLAS BOYDEN
DONALD RODGERS
ROBERT HOLMSTROM

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

S.A. SCHAPIRO
Attorney for
Petitioner
161 W.Wisconsin
avenue
Milwaukee Wis.
53203
(414)271-5585

QUESTIONS PRESENTED

Should the rule of absolute military immunity of Feres v. United States (1950) 340 U.S. 135 be re-examined, and said immunity abolished or qualified?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	3
JURISDICTION	4
CONSTITUTIONAL AND STATUTORY PROVISIONS	4
STATEMENT	4-8
REASONS FOR GRANTING PETITION	9-11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

Bivens v. Six Unknown Agents of the Federal Bureau of Investigation 403 US 388 (1971)	6,7,8
Butz v.Economou (1978) 438 US. 478	9, 10
Carlson v. Green(1980)446 U.S. 14	10
Citizens National Bank of Waukegan v. U.S. 594 F.2d 1154(1978 7th circ.)	9
Davis v. Passman (1979) 442 US 228	9
Feres v. U.S. (1950) 340 U.S. 135	4,5,6,7, 8,9,10
Jaffee v. U.S.(1981 3rd circ.) 663 F.2d 1226	9
Mariano v. U.S. (1979 4th circ.) 605 F.2d 721	9
Owen v. City of Independence(1980) 445 U.S. 622	10
Stencel Aero Engineering Corp. v. U.S. 431 U.S. 666(1977)	10
Tigue v. Swaim(1978 8th circ.) 585 F.2d 909	9
Troulis v. U.S.(1979 9th) 602 F.2d 1334	9
Wallace v. Chappell (1981 9th circ.) 661 F.2d 729	9
Woodside v. U.S.(1979 6th cir). 606 F.2d 134	9

Constitutional Provisions and statutes:

5th amendment	4
28 U.S.C. 1346(b) 2671-2680	4

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

No.

JAMES LAMMERS petitioner

vs

DOUGLAS BOYDEN, DONALD RODGERS, ROBERT HOLMSTROM respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, by S.A. Schapiro, his counsel, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit which affirmed an order dismissing the 1st, 2nd, 4th and 5th causes of action alleged by petitioner in his amended complaint.

OPINIONS BELOW

The opinions of the District Court (Appendix A and B) were not reported. The opinion of the Court of Appeals is not reported as of this time.(Appendix C). Respondents have requested the same.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 25 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 5th amendment to the United States Constitution reads in relevant part:

> "No person shall...be deprived of life, liberty or property without due process of law".

STATEMENT

The absolute intramilitary immunity rule of Feres v. United States (1950) bars suits between servicemen where compensation for losses are provided under the Federal Tort Claims Act 28 U.S.C. 1346(b) 2671-2680.

Petitioner, a navy serviceman, suffered a head injury when on leave and was treated by a civilian doctor and examined by respondent Holmstrom before returning to base. At base, he was treated by respondents Boyden and

Rodgers and sued the non-military doctor in state court for malpractise but was unsuccessful. Thereafter he filed this action against said two military physicians and the one non-military physician Holmstrom who was not sued in the state court. Five causes of action were alleged, the dismissal of four of which are sought to be reviewed. These four allege as follows:

1. First Cause: alleges common law fraud against the two military physicians alleging they falsified the history given by petitioner in the navy hospital records so as to provide a defense for the non-military physician sued in the state court.

The District Court on May 11 1979 refused to dismiss this cause (App. A p12-14) but later reversed and dismissed it on Nov. 30 1979 based on Feres. (App. B p. 19). The Court of Appeals affirmed on 2 grounds, pleading and the Feres bar, noting that Feres applied to all the

causes of action alleged. (Appendix C p.24-25).

2. Second cause: alleges a common law conspiracy among the military respondents and the non military respondent to falsify the history of petitioner in the navy hospital records.

The District Court on May 11 1979 denied the motion to dismiss as to the military physicians (appendix A p.12-17) but granted the motion of the non-military respondent doctor to dismiss. Later, on November 30 1979 the Court reversed itself and granted the motion to dismiss as to all respondents based on Feres.(App. B p.19). The Court of Appeals affirmed (App. C p. 24-5) for the same reason as it affirmed dismissal of the first cause.

3. The Fourth cause: alleges a Bivens type claim against military respondents asserting a deprivation of Fifth amendment due process of law in the state

court by reason of the falsification of said history in petitioner's hospital records by said military physician respondents, with the intent to deprive petitioner of his Fifth Amendment due process rights.

The District Court on May 11 1979 denied the motion to dismiss this cause (App. A p.12-17) but on November 30 1979 reversed itself and dismissed based on Feres. (Appendix B p. 19). The Court of Appeals on May 28 1982 affirmed on the ground that the allegations of the Bivens cause were essentially the same as alleged in the first cause, but phrased in constitutional terminology and in addition, were barred by Feres. (Appendix C p.22-4).

4. The Fifth cause: alleges a conspiracy to deprive petitioner of his fifth amendment due process rights on the part of all three respondents by reason of said falsification, with intent to do so.

The District Court by order of May 11 1979 denied the motions of the military respondents to dismiss this cause but granted the motion of the non military respondent to dismiss. (App. A p.12-17). Later on Nov. 30 1979 the District Court reversed itself and granted all motions to dismiss this cause based on Feres. (App. B p. 19). The Court of Appeals affirmed on the same grounds as it held the 4th cause dismissable. (App. C p. 22-5).

In all their motions to dismiss, the military respondents relied exclusively on Feres.

The loss which petitioner alleges is property damage - damage to his cause of action in the state court, a loss for which petitioner had no remedy under the Federal Tort Claims Act or any other statute.

REASONS FOR GRANTING THE PETITION

1. The Supreme Court has never decided the question of Federal law regarding the nature and extent of immunity that is provided military personell when sued by other personell alleging a Bivens claim, asserting fifth amendment infringements, which it ruled gave rise to a cause of action in non-military suits in Davis v. Passman(1979) 442 U.S. 228. The circuits hold as follows: Jaffee v. U.S. (1981, 3rd circ.) 663 F.2d 729, no cause of action; Wallace v. Chappell (1981, 9th circ.) 661 F.2d 729, permitted the action; Tique v. Swaim (8th circ. 1978) permitted the action based on qualified immunity.

Nor has the extent of abolition of executive immunity in Butz v. Economou (1978) 438 U.S. 478 been reconciled with the extent of immunity lingering in suits by military personell against other personell who rely on Feres. Continuing the Feres bar in the face of Butz are: Troglia v. U.S. (1979

9th circ.) 602 F.2d 1334; Mariano v. U.S. (1979 4th circ.) 605 F.2d 72; Woodside v. U.S. (1979 6th circ.) 606 F.2d 134; Citizens National Bank of Waukegan v. U.S. (1979 9th circ.) 594 F.2d 1154. Post Butz cases allowing Butz to override Feres are Wallace, supra, and Tique, supra.

The Feres rule is in obvious tension with Butz and Bivens and should be re-examined in the light of these cases and the trend of immunity abolition or modification.

2. The decision of the Court of Appeals, by denying the right to sue for fraud, where petitioner has no other remedy, is in conflict with the following decisions allowing the same where no other remedy exists: Stencel Aero Engineering Corp. v. U.S. (1977) 431 U.S. 666; Butz, supra; Carlson v. Green (1980) 446 U.S. 14.

CONCLUSION

The petition for a writ of certiorari to bring before the Court a re-examination of the Feres rule should be granted.

Respectfully Submitted,

S.A. SCHAPIRO
ATTORNEY FOR PETITIONER

July 12 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES LAMMERS, In Pro Per
Plaintiff

vs

Civil 78-1011-GT
ORDER

DONALD RODGERS M.D., DOUGLAS BOYDEN M.D., and ROBERT HOLMSTROM M.D.
Defendants

Filed May 11, 1979

Pursuant to the court's oral ruling of May 7 1979, plaintiff, James Lammers, has filed an amended complaint which contains allegations as follows:

On November 24, 1972 plaintiff sustained an eye injury in Plymouth, Wisconsin. He was treated at that time by Dr.Steffan in Wisconsin. Some time later he came to San Diego and was treated by two of the defendants in this case, Doctors Rogers and Boyden. This treatment was given at the Naval Regional Medical Center, since plaintiff was then on active duty with the Navy.

Doctors Rodgers and Boyden together with a third defendant, Doctor Holmstrom, conspired to falsify plaintiff's medical records. Plaintiff reported to Rodgers and Boyden and the medical records reflected, that he lost the sight of his injured eye over a three day period from November 24, 1972 to November 27 1972. The records were changed by Rodgers and Boyden to state that Lammers reported that the loss of sight occured immediately after the injury.

Plaintiff sued Dr. Steffan in a Wisconsin State court for medical malpractise. Lammers lost that case because of the falsification of his medical records by the defendants.

The defendants have brought motions to dismiss. They raise these objections to the

complaint:

Rodgers and Boyden, citing Feres v. United States, 340 U.S. 135(1950) and numerous Ninth Circuit cases including Tirrill v. McNamara, 451 F.2d 579(9th cir. 1971), and Bailey v. K.E. Van Buskirk, 345 F.2d 298 (9th cir. 1965) content that this suit is barred by "intramilitary immunity".

In the cited Ninth Circuit cases, and the relevant portion of Feres, the plaintiffs were active duty servicemen who suffered injury due to the negligence of physicians who were also members of the armed forces. The courts in Tirrill and Bailey held that such a physician is immune from liability to a fellow serviceman for malpractise which occurs in a military hospital while the physician is in the line of military duty. The Supreme Court in Feres held that the United States is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of, or are in the course of, activity incident to military service.

These cases involve the negligent performance of a serviceman's duty which results in injury to another serviceman. The plaintiff in the present case, however, is not suing for defendants' negligence in the performance of their military duty. Instead, the claim is for a deliberate fraud allegedly perpetrated by the defendants for the purpose of destroying plaintiff's malpractise claim

against Dr. Steffan. Such fraud is not related to the military responsibilities of the defendants. The rule of Feres and its progeny is not applicable to the present case.

Rodgers and Boyden further contend that federal officials are absolutely immune from liability on state causes of action. They cite Clifton v. Cox 549 F.2d 722 (9th. cir. 1977) and Expeditions Unlimited, Etc. v. Smithsonian Inst., 566 F.2d 289 *D.C. Cir. 1977) in support of this assertion. These cases, however, hold that a federal official is not personally liable in a civil suit for discretionary acts which bear a reasonable relation to the duties and responsibilities of the official. In our case, the alleged conduct of the defendants does not consist of discretionary acts which bear a reasonable relation to their official duties and responsibilities as military physicians. Therefore the immunity doctrine of Clifton and Expeditions Unlimited is not a basis for granting defendants' motion to dismiss.

Boyden and Rodgers also move to dismiss plaintiff's Bivens type claims. Plaintiff's theory in these cases is that the defendants conspired to and did deprive him of his fifth amendment right to due process of law by falsifying his medical records which were used in his case against Dr. Steffan in the Wisconsin court.

A Bivens type claim for a violation of a citizen's fifth amendment rights is cognizable. Jacobson v. Tahoe Regional Planning Agency 558 F.2d 928(9th cir. 1977). Moreover, intramilitary immunity is not an absolute defense to a suit for an intentional tort involving constitutional rights. Butz v. Economou, _____U.S._____, 98 S.Ct. 2894(1978) rejected the idea that federal executive branch officials are absolutely immune from liability for infringing another person's constitutional rights. 98 S.Ct. at 2900. Tique v. Swaim, 585 F.2d 909(8th cir. 1978), has interpreted Butz to mean that "military officers during peacetime are not automatically clothed with absolute immunity in every situation. Butz demands a particularized inquiry into the functions an official performs and the circumstances under which they performed prior to the granting of absolute immunity." 585 F.2d at 914. Therefore, military officers are not absolutely immune from liability for conduct which deprives another serviceman of constitutionally guaranteed rights.

The defendants in this case have made no showing to warrant a finding that they are protected by intramilitary immunity for depriving the plaintiff of his constitutionally protected right to due process of law.[1]

Rodgers and Boyden further assert that plaintiff's claim under 42 U.S.C. 1985(2)(3) must be dismissed. This statute outlaws conspiracies to obstruct justice with intent to deprive a

citizen of equal protection of the laws, and provides a damage remedy for citizens aggrieved by such conspiracies.

The defendants argue that no 1985 claim is stated unless an allegation is made that some racial or otherwise class based animus was behind the conspirators' conduct. Since there is no such allegation in this complaint, the claim must be dismissed.

This motion is well taken. Section 1985 does not create a general federal tort cause of action. Griffin v. Breckenridge 403 U.S. 89, 101(1970). The statute requires as an element of the cause of action an allegation of a racial or otherwise class based motive behind the defendants' alleged conduct. Since plaintiff has made no such allegation, no claim is stated under 1985. Griffin v. Breckenridge, supra; Phillips v. Int. Assn. of Bridge and Iron Workers, 556 F.2d 939, 940-941(9th cir. 1977).

Defendant Holmstrom moves to dismiss on the ground that the claims against him are not stated with sufficient particularity. Holmstrom is named as a defendant in plaintiff's claims for conspiracy to defraud. However, the complaint does not indicate how Holmstrom became involved in the conspiracy, or how he came in contact with the plaintiff or the other defendants. The complaint identifies Holmstrom as a physician who resides in Vero Beach Florida, but states nothing more about him or his alleged involvement in the events in question.

Fed. R. Civ. Pro. 9(b) requires that

the circumstances constituting fraud ...be stated with particularity" in all complaints charging fraud. Plaintiff has failed to comply with Rule 9 with respect to defendant Holmstrom.

Accordingly:

(A) Plaintiff's claim pursuant to 42 U.S.C. 1985 is dismissed as to all defendants.

(B) Plaintiff's claims against defendant Holmstrom are dismissed. Plaintiff is granted 20 days to amend the complaint to plead his claim with particularity.

(C) The motions to dismiss are denied in all other respects.

(D) Plaintiff's motion for judgment by default against defendant Holmstrom is denied.

Dated May 11, 1979.

/s/GORDON THOMPSON JR.
Judge

FOOTNOTE

/1/ The court makes no intimation as to: 1) whether the circumstances alleged by plaintiff constitute a valid Bivens type claim for a deprivation of due process rights guaranteed by the fifth amendment or 2) whether defendants are correct in their assertion that plaintiff's claims are grounded in state tort law and do not rise to the level of a constitutional tort because the defendants happen to be federal officials. The cases cited by defendants, Paul v. Davis, 424 U.S.

693(1976), Oakley v. City of Pasadena, 535 F.2d 503(9th cir. 1976) and Atkins v. Lanning, 556 F2d 485(10th cir. 1977) are not persuasive authority for this proposition. Neither of these issues has been adequately briefed by the parties.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT CALIFORNIA

JAMES LAMMERS Plaintiff

vs

ORDER
78-1011 GT
Filed: Nov.30
1979

DONALD RODGERS
DOUGLAS BOYDEN
ROBERT HOLMSTROM
Defendants

The facts are set out in the Courts' order of May 11 1979. The claims against defendants Rogers and Boyden must be dismissed in light of Feres v. United States 340 U.S. 135(1950). The Feres doctrine "applies with equal vitality to negligent and intentional torts." Citizens National Bank v. United States 594 F.2d 1154, 1157(7th cir. 1979). The plaintiff cannot sidestep Feres by recasting some of his allegations in terms of a constitional tort. See Misko v. United States, 453 F.Supp. 513, 515(D.D.C. 1978), aff'd 593 F. 2d 1371 (D.C. Circ. 1979). The claims against defendant Holmstrom must be dismissed because the complaint fails to allege fraud with the particularity required by Fed.R. Civ. P. 9(b) and because the complaint fails to allege the class-based animus required by 42 U.S.C. 1985(2) and 1985(3)(1976). See Griffin v. Breckenridge 403 US 88, 101(1970). Accordingly, the motions to dismiss all defendants are granted.
IT IS SO ORDERED. Nov. 3,1979.

/s/GORDON THOMPSON JR. Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5001

JAMES LAMMERS
Plaintiff-appellant

vs

DOUGLAS BOYDEN
DONALD RODGERS
ROBERT HOLMSTROM
Defendants-Appellees

MEMORANDUM
(filed May 28
1982)

Argued and Submitted
June 4 1981

Appeal from the United States District Court for the Southern District of California, J. Gordon Thompson, District Judge Presiding.

Before: NELSON, and CANBY Circuit Judges and BATTIN* District Judge (sitting by designation).

Plaintiff Lammers, appearing pro se, has appealed the dismissal of his amended complaint by the trial court. The district court dismissed plaintiff's fraud, conspiracy and Bivens claims asserted against defendants Boyden and Rodgers, naval physicians, in reliance on the Feres doctrine of intramilitary immunity, Feres v. United States, 340 U.S. 135 (1950). The court also dismissed plaintiff's fraud and conspiracy claims against defendant Holmstrom, a civilian physician, for lack of specificity pursuant to rule 9(b), Fed.R. Civ. P., and for failure to

sufficiently allege the requisite class-based animus required by 42 U.S.C. 1985 claims. The four issues raised on appeal are (1) whether the trial court erred in dismissing plaintiff's common law fraud and conspiracy claims, (2) whether plaintiff has adequately alleged deprivation of due process in his amended complaint, (3) whether a Bivens due process claim is actionable against the civiliam physician Holmstrom, and (4) whether Feres v. United States, supra, and its progeny bar plaintiff's claims and immunize defendants Boyden and Rodgers from any alleged liability.

1. DISMISSAL OF FRAUD AND CONSPIRACY CLAIMS.

First, we conclude that the district court correctly dismissed plaintiff's fraud and conspiracy claims. Rule 9(b) Fed. R. Civ. P., provides in part that:

> (b) In all averments of fraud,... the circumstances constituting fraud...shall be stated with particularity".

Since federal jurisdiction has been premised in part upon diversity of citizenship, the Court must examine and apply the state law of California, the situs of these alleged torts, in determining whether plaintiff has satisfactorily alleged fraud. In California, five elements are necessary to establish fraud: (1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage.

Younan v. Equifax Inc., 111 Cal. App. 3rd 498, 169 Cal. Reptr. 478, 486(1980). It is implicit in the district court's opinion that the vitality of the common law conspiracy count was dependent upon the survival of the fraud claim. Conspiracy alone is ordinarily not actionable, but requires the allegation of some wrongful act committed pursuant to the conspiracy. Younan v. Equifax Inc., supra, 169 Cal. Rep. at 486. Accordingly, if fraudulent conduct is not sufficiently pleaded, the conspiracy averment is no longer viable since an essential element of common law conspiracy is the commission of a civil wrong resulting in damages. 117 Sales Corp. v. Olsen 80 Cal. App. 3d 645, 649, 145 Cal. Rept. 778, 780(1978); Archibald v. Cinerama Hotels, 73 Cal. App. 3d 152, 157 160, 140 Cal. Rptr. 599, 604(1977). Even a cursory examination of the amended complaint reveals plaintiff failed to plead any reliance upon the alleged fraudulent conduct. Therefore we find no error in dismissal of the fraud and conspiracy claims.

2. DUE PROCESS CLAIMS

Count IV of plaintiff's amended complaint alleges a Bivens due process claim against the two Naval physicians Boyden and Rodgers. County V alleges a conspiracy to deprive plaintiff of his Fifth Amendment due

process rights allegedly committed by all three physicians, Boyden, Rodgers and Holmstrom. Examination of these counts reveals that they are essentially duplications of plaintiff's state tort fraud and conspiracy allegations and rely upon factual support identical to that found in counts I and II of the amended complaint. See e.g., Calhoun v. United States, 475 F. Supp. 1, 5 (S.D. Cal. 1977), aff'd per curiam, 604 F. 2d 647 (9th cir. 1979), cert. denied 444 U.S. 1078(1980). Merely designating these alleged torts as constitutional deprivations is not enough to invoke federal question jurisdiction. The Supreme Court has noted that violation of state or local law does not automatically implicate the abrogation of federal rights. Screws v. United States, 325 U.S. 91(1945). This principle has been consistently approved and reaffirmed. Paul v. Davis, 424 U.S. 693, 699-702(1976); Havas v. Thornton, 609 F.2d 372, 374-5 (9th cir. 1979); Calhoun v. United States supra, 475 F. Supp. at 5. It is true this Court has held that a valid, reviewable constitutional claim against a military official cloaks such an individual with only a qualified immunity for acts performed in good faith. Wallace v. Chappell, 661 F. 2d 729, 736-37(9th cir. 1981). However, we fail to discern from plaintiff's allegations the deprivation of any federally-protected rights secured by the constitution or federal law.Since the plaintiff has failed to allege constitutional deprivations, his attempt to fashion a Bivens claim against civilian phsyician Holmstrom also fails. Therefore,

we need not address the issue of whether a Bivens claim may properly be maintained against a private individual who conspires with federal officials to deprive a person of his or her constitutional rights. See Zarilli v. Evening News Ass'n 628 F. 2d 217, 223 and n. 11(D.C. Cir. 1980); Writers Guild of American v. American Broadcasting Co. Inc., 609 F.2d 355, 360 (9th cir. 1979),cert denied 449 U.S. 824(1980).

3. APPLICABILITY OF THE FERES DOCTRINE

The military status of Boyden and Rodgers raise the application of Feres v. United States, supra, to the facts herein. In Feres the Supreme Court established an exception to the Federal Tort Claims Act in concluding that no governmental liability exists under the Act where injuries to servicemen arise out of or are incidental to military service. Feres v. United States, supra, 340 U.S. at 146. Plaintiff contends Feres applies to negligent but not intentional tortious conduct. Plaintiff submits that the theory of qualified immunity afforded state and local government officials in Scheuer v. Rhodes, 416 U.S. 232 (1974) and applied to federal executive officials in Butz v. Economou 438 U.S. 478 (1978) is controlling here. Plaintiff apparently suggests that since Boyden and Rodgers are named as individual defendants, any cloak of immunity granted by Feres is implicitly limited by Butz. Plaintiff urges the Court to hold these defendants responsible

for their alleged torts committed beyond any parameters of their official duties. We disagree. Without the survivial of a constitutional claim, the qualified immunity theory must fail. See Wallace v. Chappell, supra, 661 F. 2d at 736. Absent some constitutional infringement, the status of the claimant-serviceman, rather than the legal theory upon which his cause of action is premised, controls the application of Feres. United States v. Lee, 400 F.2d 558, 562 (9th cir. 1968). cert. den. 393 U.S. 1053*1969). Although we have critized the harsh results which may occur in applying Feres, see Monaco v.United States, 661 F. 2d 129, 134(9th cir. 1981), this Court has recently determined that the doctrine applies with equal vigor to intentional as well as negligent tortious conduct by military employees. Lewis v. United States, 663 F. 2d 889 891 (9th cir. 1981). Plaintiff is therefore precluded from recovery for any tortious conduct allegedly committed by the Naval physicians. AFFIRMED.

Office - Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-137

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES LAMMERS, PETITIONER

v.

DOUGLAS BOYDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS BOYDEN AND ROGERS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Barr v. *Matteo*, 360 U.S. 564 3

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 ..... 2, 3, 4

Feres v. *United States*, 340 U.S. 135 ..... 2, 3

Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) 4

Parratt v. *Taylor*, 451 U.S. 527 4

Stencel Engineering Corp. v. *United States*, 431 U.S. 666 3

Wallace v. *Chappell*, 661 F. 2d 729, cert. granted, No. 82-167 (Nov. 1, 1982) 2, 4

Constitution and statute:

United States Constitution, Fifth Amendment (Due Process Clause) 2, 4

Federal Tort Claims Act:

28 U.S.C. 1346(b) 3
28 U.S.C. 2671 *et seq.* 3

Miscellaneous:

H.R. Rep. No. 97-384 (Pt. 1), 97th Cong., 1st Sess. (1981) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-137

JAMES LAMMERS, PETITIONER

v.

DOUGLAS BOYDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS BOYDEN AND ROGERS IN OPPOSITION

Petitioner, a serviceman in the United States Navy, contends that the court of appeals erred in upholding the dismissal of his damages claim against two Navy physicians.

1. Petitioner suffered an injury to his head while on leave from the Navy. Dr. Steffan, a civilian medical doctor who is not a party to this case, treated him. When petitioner returned to active duty, respondents Boyden and Rogers, who are Navy doctors, and respondent Holmstrom, a civilian, examined and treated petitioner for the same head injury. Thereafter, as a result of the injury, petitioner lost sight in one eye. Petitioner brought an action alleging medical malpractice against Dr. Steffan in Wisconsin state court but did not recover (Pet. App. A 12).

Petitioner then brought this damages action in the United States District Court for the Southern District of California, claiming that respondents altered and falsified his naval

medical records. Petitioner alleged both common law torts of fraud and conspiracy to defraud, and a violation of his Fifth Amendment due process rights. His damages action for the alleged constitutional violation was based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Pet. App. C 20).[1]

The district court, after initially refusing to dismiss the constitutional and tort claims against the military doctors (Pet. App. A 12-A 18), reconsidered and dismissed all claims (*id.* at B 19). The court reasoned that *Feres* v. *United States*, 340 U.S. 135 (1950), barred the tort actions and that petitioner "cannot sidestep *Feres* by recasting some of his allegations in terms of a constitutional tort" (Pet. App. B 19).

The court of appeals affirmed (Pet. App. C 20-C 25). It stated that "[e]ven a cursory examination of the amended complaint reveals [petitioner] failed to plead any reliance upon the alleged fraudulent conduct" (*id.* at C 22); the court ruled that since reliance was an element of common law fraud under the relevant state law, the common law claims were properly dismissed (*id.* at C 21-C 22). The court also ruled that under *Feres* v. *United States, supra*, petitioner was barred from seeking damages from the Navy physicians (Pet. App. C 24-C 25).

The court of appeals recognized that under its earlier decision in *Wallace* v. *Chappell*, 661 F.2d 729 (1981), cert. granted, No. 82-167 (Nov. 1, 1982), a serviceman can bring a *Bivens* action against military officials in certain circumstances. But the court dismissed petitioner's *Bivens* claims on the ground that they were "duplications of [his] state

---

[1]Apparently jurisdiction over the common law claims was based on diversity of citizenship (see Pet. App. C 21).

tort fraud and conspiracy allegations" (Pet. App. C 23). The court explained (*ibid.*):

> Merely designating these alleged torts as constitutional deprivations is not enough to invoke federal question jurisdiction. * * * [W]e fail to discern from plaintiff's allegations the deprivation of any federally-protected rights secured by the constitution or federal law.

The court also remarked that the *Bivens* claims "rely upon factual support identical to that found in [the common law] counts * * * of the amended complaint" (*ibid.*).

2. The petition presents the question whether "the rule of absolute military immunity of *Feres* v. *United States*" should be reexamined (Pet. 1). *Feres* held that the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, does not waive the government's sovereign immunity to suits for damages by servicemen arising out of military service. This, of course, is a suit against individuals, not against the government. In any event, there is no reason for this Court to reconsider its decision in *Feres*, which was recently reaffirmed in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). Congress has never challenged the Court's construction of the FTCA, but has in fact endorsed the *Feres* decision. See, *e.g.*, H.R. Rep. No. 97-384 (Pt. 1), 97th Cong. 1st Sess. 5 (1981). Moreover, petitioner offers no argument why the considerations the Court relied upon in *Feres* are not equally true today.

Feres aside, and even if petitioner's tort claims against the military respondents had been pleaded with sufficient specificity, those claims nonetheless would have been precluded by *Barr* v. *Matteo*, 360 U.S. 564 (1959). *Barr* held that federal officials are absolutely immune from suits for common law torts challenging actions within the outer perimeter of their authority. The Court reaffirmed this immunity

last Term (*Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 6-7), and petitioner suggests no sufficient reason for the Court now to reexamine it.

3. In connection with petitioner's *Bivens* claims, the court of appeals ruled, following its decision in *Wallace* v. *Chappell*, *supra*, that a serviceman may bring such an action against a military official in certain circumstances. The court nevertheless upheld the dismissal of petitioner's *Bivens* claims because petitioner had failed to allege a violation of the Constitution and, apparently, because his pleading was insufficiently specific.

The petition does not present the question whether allegations of fraud like petitioner's state a constitutional violation, and petitioner nowhere explains why the court of appeals erred in concluding that they do not. Petitioner asserts that respondents violated the Due Process Clause of the Fifth Amendment (Pet. 6-7; Pet. App. A14), but he fails to identify any liberty or property interest that was infringed. Petitioner does suggest (Pet. 5) that the alleged falsification of records somehow violated his rights under the Due Process Clause by influencing the state litigation. But he does not explain why the state proceedings were not an adequate forum in which to demonstrate that the records were false or otherwise to vindicate any constitutionally protected interest. See generally *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

4. The Court has granted our petition for a writ of certiorari to review the court of appeals' decision in *Wallace*. The court of appeals' holding in this case demonstrates, however, that petitioner will receive no relief even if the judgment of the same court of appeals in *Wallace* is affirmed. There is, accordingly, no reason for the Court to hold this petition pending the disposition of *Wallace*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

Office - Supreme Court, U.S.
FILED
NOV 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-137

IN THE
Supreme Court of the United States

OCTOBER TERM 1982

JAMES LAMMERS,
Petitioner,

vs.

DOUGLAS BOYDEN, DONALD RODGERS,
ROBERT HOLMSTROM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM OF ROBERT HOLMSTROM IN OPPOSITION

LAW OFFICES OF DOUGLAS M. BUTZ
A Professional Corporation
1010 Second Avenue - Suite 2001
San Diego, California 92101
(619) 233-4777

Attorneys for Respondent
ROBERT HOLMSTROM

INTERIM PRINTING & MAILING COMPANY
1108 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3080

TABLE OF AUTHORITIES

Cases:	Page
117 Sales Corp vs. Olsen, 80 Cal. App. 3d 645 (1978)	5
Bivens vs. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1981)	4,6
Feres vs. United States, 340 U.S. 135 (1940)	4,5
Younan vs. Equifax, Inc., 111 Cal. App. 498 (1980)	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

JAMES LAMMERS, Petitioner

vs.

DOUGLAS BOYDEN
DONALD RODGERS
ROBERT HOLMSTROM,

Respondents

No. 82-137

MEMORANDUM OF ROBERT HOLMSTROM IN OPPOSITION TO PETTTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

1. Petitioner, a Navy serviceman, suffered a head injury while on leave from the Navy. He was treated by a civilian doctor in Wisconsin named Dr. Steffins, and released. As a result of the injury, petitioner suffered a loss of sight in one eye and he was referred by Dr. Steffins to another civilian doctor, ROBERT HOLMSTROM, M.D., respondent herein, who examined and treated petitioner with respect to the loss of sight. Thereafter, petitioner returned to active duty and came under the care of respondents

BOYDEN and RODGERS, Navy physicians at the Naval Regional Medical Center in San Diego. Petitioner brought a malpractice action against Dr. Steffins in the State Court of Wisconsin. He was unsuccessful in that action and thereafter brought the present action in the United States District Court for the Southern District of California. Petitioner alleged that BOYDEN and RODGERS defrauded him by altering and falsifying his naval medical records in order to protect Dr. Steffins in the defense of the State Court action. Petitioner also alleged that HOLMSTROM conspired with BOYDEN and RODGERS to engage in such conduct.

The second and fifth causes of action of petitioner's First Amended Complaint are the only ones pertaining to HOLMSTROM. The second cause of action alleges that HOLMSTROM conspired with the two Navy physicians to falsify petitioner's naval medical records to protect a colleague in the Wisconsin State Court action. The fifth cause of action alleges the same set of facts but goes on to allege that such acts were done to deprive petitioner of certain constitutional rights.

The District Court dismissed all claims against the military physicians on the basis of the Feres doctrine. Feres vs. United States, 340 U.S. 135 (1940). With respect to HOLMSTROM, a civilian, the Court dismissed the conspiracy to defraud claim for lack of specificity pursuant to Rule 9(b), Federal Rules of Civil Procedure, and for failure to sufficiently allege the requisite class-based animus required by 42 U.S.C. §1985. The Court dismissed the Bivens due process claim (Bivens vs. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1981)) against HOLMSTROM on the ground that petitioner failed to allege deprivation of any federally-protected or constitutional rights.

2. Petitioner frames the issue in his brief under the section entitled "Questions Presented" (P.1) as being whether the Feres doctrine should be "re-examined" and whether the intra-military immunity created thereby should be "abolished or qualified". The dismissal of the claims against HOLMSTROM, a civilian, was not based on the Feres doctrine. Therefore, a resolution of this issue, one way or the other, will have no bearing on petitioner's

claims against HOLMSTROM or the dismissal of such claims by the Court below. Therefore, if this Court were inclined to review the decision below solely with respect to the applicability of the Feres doctrine, such review should not extend to the dismissal of HOLMSTROM, as separate from the co-respondents.

3. Although peitioner's sole "Question Presented" relates to the applicability of the Feres doctrine, petitioner also challenges as improper the District Court's dismissal of his fraud-related claims (p.10). This issue was summarily disposed of by the Ninth Circuit Court of Appeals (Memorandum Decision, P.2). Citing Rule 9(b), Federal Rules of Civil Procedure, which requires that all averments of fraud must be pleaded with particularity, the Court noted that petitioner had not set forth all of the elements of fraud, and futhermore, that without an appropriate fraud allegation, "conspiracy" to commit fraud could not stand. Younan vs. Equifax, Inc., 111 Cal. App. 498 (1980); 117 Sales Corp vs. Olsen, 80 Cal. App. 3d 645 (1978).

Respondent submits that the Court's dismissal

of petitioner's fraud related-claims was appropriate and that the reasons therefor do not raise any constitutional issues which merit review by this Court.

4. With respect to petitioner's Bivens type claims, the Ninth Circuit concluded that petitioner had failed to allege deprivation of any federally-protected or constitutional rights sufficient to support a due process claim, or one step further, a "conspiracy" to violate due process claim. Petitioner's brief is silent at this time with respect to such issues and respondent submits that such silence belies the frivolous nature of such claims, which were appropriately dismissed below.

5. WHEREFORE, and for the foregoing reasons, respondent ROBERT HOLMSTROM, respectfully submits that the petition for a writ of certiorari should be denied.

DATED: November 1, 1982 Respectfully submitted,

Stephen D. Lucas

STEPHEN D. LUCAS
Attorneys for Respondent
ROBERT HOLMSTROM